Nos. 82-2092 and 83-252

# In the Supreme Court of the United States

OCTOBER TERM, 1983

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CHRIS PETTI, ET AL.

*v.*

UNITED STATES OF AMERICA

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DOMINIC BARTOLATTA, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

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## TABLE OF AUTHORITIES

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Petitioners contend that the Assistant Attorney General who authorized the application for telephone interceptions had no authority to do so, and that the affidavit supporting the application for the initial interception inadequately demonstrated that other investigatory techniques were ineffective.

1. Following a bench trial in the United States District Court for the Southern District of California, petitioners were convicted of conducting an illegal gambling business,

in violation of 18 U.S.C. 1955 (Count 2), and conspiring to do so, in violation of 18 U.S.C. 371 (Count 1).[1] Petitioner Petti was sentenced to imprisonment for a year and a day and fined $10,000 on Count 1, and was given a suspended sentence, five years' probation, and a fine of $15,000 on Count 2. Petitioner Sica was fined $10,000 on Count 1, and was given a suspended sentence, five years' probation, and a $15,000 fine on Count 2. Petitioner Montalto was sentenced to six months' imprisonment on Count 1, and was given a suspended sentence, five years' probation, and a $10,000 fine on Count 2. Petitioner Bartolatta was sentenced to imprisonment for a year and a day and fined $10,000 on Count 1, and was given a suspended sentence, five years' probation, and a fine of $10,000 on Count 2.

The evidence at trial showed that petitioners were involved in a gambling enterprise that handled wagers on professional and college football games from the fall of 1977 until approximately January 1981. Petitioners Petti and Sica owned, financed, managed, and directed one portion of the enterprise, and petitioner Bartolatta owned, financed, managed, and directed the other. The "line" information on the games was supplied to both groups by petitioner Montalto, and both had a common clerk.

Prior to trial petitioners moved to suppress evidence obtained from the court ordered telephone interceptions, claiming that they were not properly authorized by an Assistant Attorney General under 18 U.S.C. 2516(1) and that the affidavit filed in support of the application for the initial order failed to set out specific facts sufficient to show that other investigative techniques had been tried and failed

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[1] Petitioners Petti and Montalto were acquitted on two counts charging interstate transmission of wagering information, in violation of 18 U.S.C. 1084.

or were unlikely to succeed if tried or would be too dangerous, as required by 18 U.S.C. 2518(1)(c).[2] After an evidentiary hearing, the district court denied the supression motions.

2. Petitioners first maintain (Pet. 7-8)[3] that the intercept applications made in December 1980 and January 1981 were unlawful because they were authorized by an Assistant Attorney General specially designated by former Attorney General Griffin Bell on August 15, 1978, rather than by his successor in office, Benjamin Civiletti.[4] Petitioners' claim does not merit review by this Court.

The statute, 18 U.S.C. 2516, provides that "[t]he Attorney General, or any Assistant Attorney General specifically designated by the Attorney General, may authorize an application to a Federal judge" for an intercept order. Here, the application was authorized by an Assistant Attorney General under the specific designation of the Attorney General, albeit the prior Attorney General. That designation satisfied the statutory requirement.

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[2]The subsequent applications relied in part on information obtained in the original interception. Accordingly, if the first interception was not properly authorized, the subsequent interceptions would have been tainted by the initial illegality.

[3]"Pet." references are to Petition, No. 82-2092, which is incorporated by reference in Petition, No. 83-252 (at 4-5).

[4]By order No. 799-78 of August 15, 1978, Attorney General Bell specially designated the Assistant Attorney General in charge of the Criminal Division and, upon his absence or unavailability, the Assistant Attorney General in charge of the Tax Division to exercise the power under 18 U.S.C. 2516(1) to authorize applications for intercept orders. Both designations were by title only, not by name. The challenged applications were authorized by M. Carr Ferguson, who was Assistant Attorney General in charge of the Tax Division both in August 1978 and at the time of the authorization.

Contrary to petitioners' argument, nothing in *United States* v. *Giordano*, 416 U.S. 505 (1974) (authorization by Attorney General's executive assistant not permitted by 18 U.S.C. 2516) casts any doubt on the applicability to this situation of the basic principle of administrative law that "[t]he acts of administrative officials continue in effect after the end of their tenures until revoked or altered by their successors in office." *United States* v. *Wyder*, 674 F.2d 224, 227 (4th Cir.), cert. denied, 457 U.S. 1125 (1982). See also *In re Weir*, 520 F.2d 662, 667 (9th Cir. 1975) ("The rules and orders of an Attorney General continue to govern the Department of Justice (notwithstanding the advent of new Attorneys General) until they are changed or altered"). Moreover, as the court said in *Wyder, supra*, 674 F.2d at 227, in rejecting a substantially identical objection to the continuing effect of Attorney General Bell's order of August 15, 1978, it "cannot rationally [be] maintain[ed] that Assistant Attorney General [Ferguson] was exercising his authority without the knowledge and consent of Attorney General Civiletti."

3. Petitioners also contend (Pet. 9-11) that the affidavit failed to comply with 18 U.S.C. 2518(1)(c), arguing that insufficient facts were alleged to show that other investigative procedures could not have been successfully utilized. The court below properly rejected this claim.

The role of the appellate court in reviewing the sufficiency of an application for an intercept order "is not to make a *de novo* determination of sufficiency as if it were a district judge, but to decide if the facts set forth in the application were minimally adequate to support the determination that was made." *United States* v. *Scibelli*, 549 F.2d 222, 226 (1st Cir.), cert. denied, 431 U.S. 960 (1977). The statute, 18 U.S.C. 2518(1)(c), requires that an application for an intercept order show that "other investigative

procedures have been tried and failed or * * * reasonably appear to be unlikely to succeed if tried or to be too dangerous." It is established that "the purpose of § 2518(1)(c) was not to 'foreclose electronic surveillance until every other imaginable method of investigation has been unsuccessfully attempted, but simply to inform the issuing judge of the difficulties involved in the use of conventional techniques.' " *United States* v. *Feldman*, 535 F.2d 1175, 1179 (9th Cir.), cert. denied, 429 U.S. 940 (1976) (quoting *United States* v. *Robertson*, 504 F.2d 289, 293 (5th Cir. 1974), cert. denied, 421 U.S. 913 (1975)). See *United States* v. *Smith*, 519 F.2d 516, 518 (9th Cir. 1975). While electronic surveillance is not to be routinely employed as the initial step in a criminal investigation, *United States* v. *Giordano, supra*, 416 U.S. at 515, the law does not require that such surveillance "be used only as a last resort." *United States* v. *Bailey*, 607 F.2d 237, 242 (9th Cir. 1979); *United States* v. *Spagnuolo*, 549 F.2d 705, 709-710 (9th Cir. 1977). Finally, ordinary investigative procedures need not be completely unsuccessful before an intercept can be authorized; "[t]hey need only to have reached a stage where further use cannot reasonably be required." *United States* v. *Spagnuolo, supra*, 549 F.2d at 710, n.1.

The court below, consistently with its earlier decision in *United States* v. *Kalustian*, 529 F.2d 585 (9th Cir. 1975), correctly found that the government had made adequate showings of necessity to support the application in question by reciting "particularized and detailed information" to support the asserted inadequacy of other investigatory techniques (Pet. App. 2a). See Aff. 53-59.[5] In particular, the affidavit described the normal investigative methods that

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[5] "Aff." refers to the December 23, 1980, affidavit in support of the intercept application. We are lodging a copy of that affidavit with the Clerk of this Court.

had been tried with limited success during the four-month investigation conducted prior to the application (Aff. 7-43). It also stated that the two most important informants were unwilling to testify in open court because they feared petitioners Petti, Sica, and Montalto (Aff. 53). In addition, the affidavit described why other investigative techniques, such as ordinary surveillance or searches pursuant to a traditional search warrant, were unlikely to be successful in this kind of illegal gambling operation (Aff. 4-7, 53-59).[6] The court of appeals correctly found this showing adequate to satisfy the statute, and there is no occasion for further review of that fact-bound determination.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
*Solicitor General*

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[6]Even more specifically, the affidavit indicated that petitioner Petti was extremely cautious and monitored his surroundings carefully (Aff. 55).

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